United States Court of Appeals

for the Second Circuit

PETITION FOR REHEARING EN BANC

75-1124

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

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P/S

UNITED STATES OF AMERICA, Respondent-Appellee vs. HOWARD M. BRONSTEIN and DOUGLAS P. PENNINGTON, Petitioner-Appellant	DOCKET NO. 75-1124, 75-1125 SUGGESTION FOR EN BANC CONSIDERATION UNDER RULE 35(b), RULES OF APPELLATE PROCEDURE

Petitioner-appellants Bronstein and Pennington suggest that this Court reconsider en banc the appeal herein for the reasons that (1) consideration by the full court is necessary to secure or maintain uniformity of its decisions; and (2) the proceeding involves a question of exceptional importance.

Respectfully Submitted,

PETITIONER-APPELLANTS BRONSTEIN and PENNINGTON

By Stephen McEleney

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,	:	
Respondent-Appellee	:	DOCKET NO. 75-1124, 75-1125
vs.	:	
HOWARD M. BRONSTEIN and DOUGLAS P. PENNINGTON,	:	MEMORANDUM IN SUPPORT OF SUGGESTION FOR EN BANC CONSIDERATION
Petitioner-Appellant	:	

I. STATEMENT OF THE CASE

This appeal raises two separate but equally significant issues involving continually arising problems of law enforcement.

First, the appeal seeks a determination of the validity of warrantless dog-sniff searches of airport luggage for contraband not related to flight security. The district court upheld the dog search involved here without written opinion; the appellate panel upheld it on two conflicting theories, the majority ruling no search had occurred, the concurring opinion finding a reasonable warrantless search even though no probable cause existed.

Not only does the legitimacy of the dog search present a question of exceptional and continuing importance, but the legal theories espoused by the appellate panel stand in direct conflict with an already unsettled area of law

dealing with the applicability of the Fourth Amendment to warrantless airport searches.

Second, this appeal attacks the seriously questionable manner in which the federal agents involved, as a general practice, procure consents to search from in-custody defendants. Although the evidence reveals a presentment of different bail requirements based only on defendants agreement to "consent", combined with a clear-cut disregard for repeated requests for counsel, as a tactic to obtain the appellants' cooperation and waiver of constitutional rights, the district court upheld the consent, again without written opinion, and the appellate panel affirmed on the facts without reaching the constitutional illegitimacy of the agents' tactic.

The agents' use of bond as a coercive tool, as a general practice, raises constitutional questions of exceptional importance.

II. ARGUMENT

A. THE DOG SEARCH OF APPELLANT'S LUGGAGE.

The original panel upheld, on two conflicting legal theories, the warrantless dog search of appellants' luggage at Bradley Airport. The majority opinion, per Mulligan, J., held that the action of the state police dog in sniffing, biting and clawing the appellants' suitcases did not constitute a search and thus was not limited by Fourth Amendment warrant or probable cause standards. Judge Mansfield's concurring opinion rejected this conclusion, but upheld the dog's search as permissible given the combination of the

passenger's decreased expectation of privacy, concerning his luggage and the reliable information possessed by the law enforcement agents.

It is respectfully submitted that these rationales for upholding the dog's action are both flawed and stand in conflict not only with each other but with the established law of this Circuit. Especially since airport dog searches now constitute a regular means of law enforcement, this Court must determine the legitimacy of the practice in accordance with a consistent and established legal theory.

This Circuit has repeatedly held that the use of a magnetometer at airports to inspect closed luggage constitutes a search to which Fourth Amendment protections attach. United States v. Albarado, 495 F.2d 799 (2d Cir. 1974); United States v. Edwards, 498 F.2d 496 (2d Cir. 1974); United States v. Bell, 464 F.2d 667 (2d Cir. 1972).

While the majority opinion seeks to distinguish a dog search from a magnetometer search, Judge Mansfield's concurring opinion demonstrates well the constitutional infirmity of the attempted distinction:

> There is no legally significant difference between the use of an X-ray machine or magnetometer to invade a closed area in order to detect the presence of a metal pistol or knife, which we have held to be a search, United States v. Albarado, 495 F.2d 799, 802-03 (2d Cir. 1974), and the use of a dog to sniff for marijuana inside a private bag. Each is a non-human means of detecting the contents of a closed area without physically entering into it. The magnetometer ascertains whether there is metal in the hidden space by detecting changes in the magnetic fields surrounding the area of the hidden space. The dog uses its extremely sensitive olfactory nerve to deter-

> mine whether there are marijuana molecules emanating from the hidden space. Neither constitutes a particularly offensive intrusion, such as ransacking the contents of the hidden space, or exposing a person to indignities in the case of a personal search. But the fact remains that each detects hidden objects without actual entry and without the enhancement of human senses. The fact that the canine's search is more particularized and discriminate than that of the magnetometer is not a basis for a legal distinction. The important factor is not the relative accuracy of the sensing device but the fact of the intrusion into a closed area otherwise hidden from human view, which is the hallmark of any search. If, as we have held, examination of carry-on luggage and individual passengers by a magnetometer or X-ray machine amounts to a search within the prohibition of the Fourth Amendment because it discloses hidden items within areas where there is a normal expectation of privacy. United States v. Albarado, supra, 495 F.2d at 802-03, then the intrusion of a sniffing dog in search of marijuana must also fall within that prohibition when directed at hidden areas where there is similarly a normal expectation of privacy. Opinion at 5511-12.

The majority opinion is thus in clear conflict with the established law of this Circuit and must be overturned. United States v. Albarado, supra.

Although holding the dog's action to constitute a search, Judge Mansfield's concurrence upholds the intrusion primarily on a theory of the passenger's decreased expectation of privacy with respect to his luggage:

> Since a person's expectation of privacy with respect to his baggage declines as the anticipated public access to the baggage increases, it is not unreasonable, where the police have reasonable grounds to suspect the presence of contraband, to permit use of an external method or device to determine whether the baggage contains contraband. Opinion at 5513.

In Albarado, this Court specifically rejected such a premise with

respect to magnetometer searches:

> It has been suggested that those who seek to travel on a common carrier have a lower "expectation of privacy" regarding their person and the bags they carry than those who, say, merely walk on a public street. Such a suggestion has little analytical significance; if it were announced that all telephone lines would be tapped, it could be claimed that the public had no expectation of privacy on the telephone. United States v. Albarado, 495 F. 2d at 806.

Indeed, it has been stated that while carry-on baggage is subject to search for security reasons, other baggage is secure from intrusion:

> All baggage is not generally subject to search according to the F. A. A.'s directives; rather, only carry-on baggage is generally subject to search. ...[O]ne may merely consign any baggage he does not want searched to the baggage compartment.
> United States v. Edwards, 498 F. 2d 496, 504 (2d Cir. 1974). (Oakes, Jr., concurring).

This Circuit has been willing to uphold warrantless magnetometer searches for two reasons, neither of which is applicable to the dog search at issue here. First, courts have rightly recognized the enormous dangers to life and property created by hi-jackers and the need to insure the safety of air travel. This Circuit has explicity rejected such airport searches, however, "as a general means for enforcing the criminal laws." United States v. Edwards, supra, at 500. It is, of course, unquestioned that the appellants' luggage was not searched for security reasons.

Secondly, the magnetometer search has been upheld because passengers are forewarned of the search, are not unaware of a surreptitious

search when it is made, and may avoid the search in several ways. (i.e., by not flying or by placing luggage in the baggage compartment). Albarado, supra, at 806-7. The dog search here was unannounced, surreptitiously conducted, and unavoidable -- not only by the appellants but by the other passengers on the airplane as well.

It is to be noted that the agents did not have probable cause to support the issuance of a search warrant when they conducted the dog search. [See Gov't's Brief at p. 8.] Thus, under the rationale suggested by Judge Mansfield, a search is authorized absent (1) a warrant on the basis for obtaining a warrant, (2) the exigent circumstance created by the danger posed by hi-jackers, and (3) prior warning to the passenger. It is respectfully submitted that such a rationale cannot be permitted to stand as the law of this Circuit.

B. COERCION OF CONSENT TO SEARCH

Defendants also request the court to review the question of whether the Defendants voluntarily consented to a search of their suitcases. Defendants wish to be heard on the crucial point raised on appeal which was not discussed in the opinion of the three-judge panel. That is, even assuming all facts found by the district court concerning bond, the Defendants consent for a search was coerced as a matter of law.

On pages 34 through 37 of their brief, Appellants urged that consent

was coerced as a matter of law even under the district court's finding of fact. Although the question of volitional consent is usually determined under the "totality of all the circumstances", appellants contend it is coercion per se to utilize the bonding procedure to extract concession of constitutional rights from a defendant. This memorandum addresses itself to this issue in the desire that the full court consider this monumental question of law.

Although the district court found the defendants had initiated the conversation concerning bond, the following facts are uncontested under the district court finding, and uncontrovertible on the record:

1. Defendants were informed by the arresting Drug Enforcement Administration Agents, that the federal magistrate to whom they would be presented, would follow the agents recommendation as to the amount of bail to be imposed 95% of the time. (Transcript p. 58).

2. Defendants were informed by the D. E. A. Agents that a surety bond would most likely be imposed without the agents recommendation for a non-surety bond. (Transcript p. 85 and 86).

3. The D. E. A. Agents informed defendants they would recommend a non-surety bond if, and only if, the defendants consented to a search of their suitcases. (Transcript p. 59).

Under these facts, there exists an unconstitutional coercion of defendants consent regardless of any of the other facts found by the district court. It is coercion per se to permit the bail procedure to operate as a means

of extracting a defendant's Fourth Amendment rights. The bail procedure must not, and cannot be used to manipulate a defendant to concede his constitutional rights. Thompson v. Warden of House of Detention, 214 N. Y. S. 2d 171 (1961).

After defendants were placed under arrest, they possessed the right to a hearing before an impartial magistrate, which magistrate was obliged to release them unless he was not reasonably assured the defendants would appear in court. United States Constitution, Amendment VIII; Federal Rules of Criminal Procedure, Rule 46; 18 U. P. S. C. 3146; Stack v. Boyle, 342 U. S. 1, 5(1961). Bail set for any reason other than assurance of appearance in court, is excessive and illegal in Stack v. Boyle, supra.

The uncontested facts reveal defendants were informed they would appear before a partial magistrate, who would follow the agents' recommendation as to bail 95% of the time. Defendant were also informed their bail was not contingent upon assurance of their appearance in court, but upon their willingness to consent to a search. Whether a defendant wishes to waive his Fourth Amendment rights, has no bearing on an assurance he will appear for trial.

In adopting the government's finding of fact below, the district court found the defendants asked the Federal Narcotics Agents if a non-surety bond could be recommended in return for the defendants consent to a search. Mention of this finding was made in the opinion of this Court's three-judge panel.

(Opinion p. 5510.)

Appellants again urge that this finding is without legal significance. If the defendants felt that they must offer their Fourth Amendment rights in order to obtain the lowest bail which would assure their appearance, they should have been informed they were mistaken. Defendants should have been informed an impartial magistrate would be provided, and they would be released without case requirement unless the magistrate felt they would not return for trial. See 18 U.S.C. 3186. Instead, the defendants belief and fear that they must concede their Fourth Amendment rights was supported, encouraged and verified by the agents response.[1] Defendants were told the D.E.A. Agents, not the magistrate held the key to their release and this key would turn only upon their consent.

Nor can defendants be penalized for breaching the subject of their Eighth Amendment rights. In inquiring into the amount of their bail, the defendants can only be deemed to be concerned about their rights, and they cannot be held to have waived those rights. This is especially true where defendants expression of a desire to consult counsel had been ignored.

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1. The defendants point out that it defies belief to maintain it suddenly occurred to defendants, without prompting, that the amount of their bail was contingent on concession of their Fourth Amendment rights. This idea was first suggested by the agents, but that fact is not important for purposes of this discussion.

It also does not settle the question to simply conclude the defendants could have refused to consent without penalty. Assuming the integrity of the magistrate, the non-surety bond actually imposed was all that was necessary to assure the defendants appearance in court. If the D. E. A. Agents are to be believed however, the magistrate would have imposed a surety bond absent the defendants consent. Therefore, either the magistrate is not impartial and follows the dictates of the agents who use this power to coerce, or the agents mislead the defendants to believe the magistrate would impose a surety bond without their favorable recommendation. Such a misrepresentation, coupled with the agents' statement that they would be able to procure a search warrant, is analagous to Bumper v. North Carolina, 391 U.S. 543 (1968) where officers misrepresented their ability to procure a search warrant and the defendants "consent" was deemed coerced.

See also United States v. Farullo, 506 F.2d 490, 497 - 498 (2nd Cir. 1974) (Newman, Jr., concurring.)

In conclusion, despite the three-judge panel's decision that the district court finding of fact was not clearly erroneous, consent was coerced.[2] Coercion results as a matter of law where a defendant's rights under the Eighth Amendment of the United States Constitution, Rule 46 of the Federal Rules of Criminal Procedure and 18 U.S.C. 3146 are forfeited in the event the defendant

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2. If granted permission to present their case En Banc, defendants would also ask the court to review certain of the district court finding of facts.

chooses to exercise his Fourth Amendment rights.

Respectfully Submitted,

PETITIONER APPELLANTS HOWARD M. BRONSTEIN and DOUGLAS P. PENNINGTON

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CERTIFICATE OF SERVICE

A copy of the foregoing has been mailed this date to the office of Thomas P. Smith, Esquire, Assistant United States Attorney, 450 Main Street, Hartford, Connecticut, this 8th day of September, 1975.

Stephen McEleney

Stephen McEleney, Esquire